IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 26.07.2007

CORAM

THE HONOURABLE MR. JUSTICE S.J.MUKHOPADHAYA
AND
THE HONOURABLE MS. JUSTICE K.SUGUNA

W.P. NO. 2504 OF 1995

The Palani Hills Conservation Council
rep. by its Vice President
Mr. Navroz Mody
Kodaikanal - 2. .. Petitioner

- Vs -

1. The Union of India
   rep. by its Secretary to Government
   Ministry of Environment and Forest
   Paryavaran Bhavan, CGO Complex
   Phase II, Lodhi Road
   New Delhi - 3.

2. The State of Tamil Nadu
   rep. by its Secretary to Government
   Municipal Administration and
   Water Supply, Fort St. George
   Madras 600 009.

3. Pleasant Stay Hotels (Kodai)
   Private Limited, rep. by its
   Executive Director, Mr.Rakesh Mittal
   Old Post Office Roiad
   Kodaikanal.

4. Mr. Rakesh Mittal
   C/o. Pleasant Stay Hotels
   Post Office road,
   Kodaikonal.

5. Kodaikanal Township Committee
   C/o Collector, Dindigul
   Anna District. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, for the issuance of a writ of declaration declaring the Tamil Nadu District Municipalities (2nd Amendment & Validation) Act, 1994, as ultra vires Article 14 and 21 of the Constitution of India.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

For Petitioner : Mr. T.Mohan
for M/s.J.Sivanandaraj
For Respondents : Mr. K.Gunasekar, ACGSC for R-1
Mr. D.Sreenivasan, AGP, for R-2
Mr. P.Srinivas for R-5
No Appearance for RR-3 & 4

ORDER

S.J.MUKHOPADHAYA, J.

This writ petition, in public interest, has been preferred by the petitioner for the issuance of a writ of declaration declaring the Tamil Nadu District Municipalities (2nd Amendment & Validation) Act, 1994, (hereinafter referred to as the 'Amendment & Validation Act, 1994) as ultra vires Article 14 and 21 of the Constitution of India.

By the aforesaid amendment, the State of Tamil Nadu substituted Section 217-Q in place of the old Section 217-Q of Tamil Nadu District Municipalities Act, 1920, (hereinafter referred to as 'Act, 1920) empowering the State to exempt or relax the Central Government or the State Government or any building or class of buildings from all or any of the provisions of Chapter X and X-A of Act, 1920. By new Section 3 of the Amendment & Validation Act, 1994, all acts done, proceeding taken, orders issued by the State Government exempting building or class of buildings from the provision of the particular Act during the period commencing between 9th Dec., 1992 and 28th Nov., 1994, have been validated, notwithstanding anything contained in any law in force or any judgment or decree or order passed by the Court or any authority.

2. The petitioner, a registered society, has its objective of preservation and protection of ecology of the Palani Hills, an area extending over 2000 sq. kms. It being vitally interested in the ecology of the hills, including Kodaikanal town, had taken up many matters in public interest. According to the petitioner, it is bringing to the notice of the Court the impunity with which the State Government had been exercising the non-existent power and, when confronted, with legislation, had been attempting to legitimise infractions of law. The impugned act is an attempt at usurpation of judicial power and is fraught with dangers as exercise of powers conferred upon the 1st respondent by virtue of the Act would lead to the deterioration of ecology of hill stations, such as Kodaikanal in Tamil Nadu.

The petitioner society had been actively campaigning against the proliferation of construction, which had come in total disregard of all planning regulations. It initiated proceeding in respect of pollution of Kodaikanal lake by holiday resort promoters and other establishments around the lake. Subsequently, a 'no construction zone' of 200 mtrs. had been established around the lake. The petitioner society was called upon by the Chairman of the Township Planning Committee to submit representation to the draft master plan and it filed representation before the High Power Committee setup to investigate pollution of Kodaikanal lake. It pointed out the recent development of commercial buildings and the enormous strain it placed on the fragile ecology of the town and the lake in particular. Pursuant to such hearing, the Kodaikanal Master Plan

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

came into being to zone the town and stipulate F.S.I. as the principle regulator of growth as is the practice in other metropolitan master plans. Amongst various other activities, petitioner society is planting trees, running several nurseries for supply of seedlings to farmers, preservation of flora and fauna, sustainable development of Palani Hills, villages, including analysis and safeguarding of dwindling drinking water sources, bee keeping, women's welfare and environmental education.

3. Further case of the petitioner is that Kodaikanal town with a population of 25,000, spread over an area of 2 sq. km., became a vibrant tourist paradise with all the attendant evils, which are inadequate sanitation, scarce drinking water supply and increase in urbanisation of a fragile hill station. Kodaikanal Towhship Committee, which is the local planning authority for Kodaikanal, had proved largely unable and incapable of meeting the challenges posed by increasing urbanisation and has been unable to enforce building requirements, which had been framed after meticulous survey done on foot by the Directorate of Town and Country Planning, Madras, the apex body for urban planning activity in Tamil Nadu. Recognising Kodaikanal's fragile eco system, a draft master plan, prepared in 1988, restricted the heights of the buildings, objections were called for and finally came for approval in April, 1993. Between the publication of the draft master plan and the approval of the master plan of Kodaikanal Town, the 3rd respondent, M/s.Pleasant Stay Hotels commenced work on its sanctioned two floors, but illegally constructed ground plus six floors without approval of plan.

4. The petitioner, being aggrieved, preferred a public interest litigation, reported in 1995 (2) WLR 737 - Palani Hills Conservation Council - Vs - State of Tamil Nadu & Ors. The writ petition was preferred in the year 1992 and, whileso pending, the impugned Amendment and Validation Act, 1994, came into force on 28th Nov., 1994. A Division Bench of this Court, at paragraph-15 of the judgment referred to above, noticed that when the two writ petitions were taken up for disposal on 18th Oct., 1994, on behalf of the State Government, adjournment was sought for. The matter was being adjourned periodically. On 9th Nov., 1994, a bill was moved in the Legislative Assembly to amend the District Municipalities Act by amending Section 217-Q so as to provide for a power of exemption to the Government with regard to private buildings also. The Bill was passed and Amending Act, viz., Tamil Nadu District Municipalities (2nd Amendment and Validation) Act, 1994, (No.52 of 1994) was passed and it received the assent from the Governor on 26th Nov., 1994, and gazetted on 28th Nov., 1994. As per the amendment, Section 217-Q empowers the State Government to exempt any building or class of buildings from all or any of the provisions of Chapter X or Chapter X-A of the Act or relax any rule made under the said Chapters in respect of all buildings or class of buildings. Section 3 of the said Act contain the validation clause, the amended Act reads thus:-

> "1. (1) This Act may be called the Tamil Nadu District Municipalities Act, 1920 (hereinafter referred to as the principal Act), the following section shall be substituted, namely :-
>
> "217-Q. Power to exempt or relax - The State Government may, if satisfied that it will not result in the deterioration of senic beauty or destruction of the

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

environment and eco-system of the hill station, by order, -

(a) exempt, subject to such conditions if any, as may be specified in the order, the Central Government or the State Government or any building or class of buildings from all or any of the provisions of this Chapter or Chapter X of this Act; or

(b) relax, subject to such conditions if any, as may be specified in the order, any rule made under this Chapter or Chapter X of this Act, in favour of the Central Government or the State Government or in respect of any building or class of buildings.".

3. Notwithstanding anything contained in any law for the time being in force or in any judgment, decree or order of any court or other authority, all acts done, proceedings taken or orders issued by the State Government exempting any building or class of buildings from any of the provisions of the principal Act or relaxing any of the rules made under Chapter X or Chapter X-A of the principal Act in respect of any building or class of buildings, during the period commencing on the 9th day of December 1992 and ending with the date of publication of this Act in the Tamil Nadu Government Gazette shall for all purposes, be deemed to be and to have always been validly done, taken or issued in accordance with law, as if section 217-Q of the principal Act, as amended by this Act, had been in force at all material times when such acts, proceedings or orders were done, taken or issued."

In the earlier case, it was pleaded on behalf of the State that Section 3 of the amended Act is a validating provision. The expression "for all purposes" means that the validity of the exemption orders passed between 9th Dec., 1994 and 28th Nov., 1994, i.e., the date of publication of the said Act cannot be questioned in any court of law. Such submission was not accepted by the Division Bench of this Court, which proceeded to consider the question whether the Government Orders under challenge were valid or not, as if Section 217-Q of the amended Act was in existence from 9th Dec., 1992. The aforesaid case, preferred by the petitioner, Palani Hills Conservation Council (supra), was allowed alongwith some other cases with the following observations :-

"67. In the result, all the three writ petitions are allowed in the following terms :

(1) A writ of Mandamus shall issue directing respondents 1 and 2 in W.P. No.13231 of 1992 to demolish the building constructed by the Hotel to the extent to which it is contrary to the plan sanctioned by the second respondent on 01.11.1991. Respondents 1 and 2 shall see to it that there are only two floors, ground floor and first floor above natural ground level of the site as per the original plan submitted by the hotel for sanction in April, 1991. The remaining part of the building shall be demolished.

(2) It is necessary for the Hotel to obtain environmental clearance from the Central Ministry.

(3) Till the demolition as aforesaid and till obtaining clearance of the Central Ministry, there shall be no

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

supply of electricity or water to the Hotel and no occupancy shall be permitted in the building.

(4) The second respondent-Township Committee is hereby directed to investigate all the cases of constructions in Kodaikanal erected in contravention of the Rules and take appropriate action in accordance with law against the violators within a period of three months from this date.

(5) G.O. Ms. No.126, Municipal Administration and Water Supply, dated 13.05.1994 is quashed.

(5) G.O. Ms. No.317, Municipal Administration and Water Supply, dated 6th December, 1994 is quashed.

(7) The petitioner is entitled to costs in W.P. No.13104 of 1994 and 20375 of 1994 against the first respondent therein. Counsel's fee Rs.2,500/= in each of the said writ petitions.

5. Pleasant Stay Hotel and Another, thereafter, moved before the Supreme Court against the aforesaid judgment of the Division Bench of this Court, reported in 1995 (2) WLR 769. The Supreme Court upheld the Division Bench judgment with the following observation :-

"27. Since the above findings of fact are based on a proper appraisal of the entire materials available to the High Court we do not find any reason to disturb the same sitting in our jurisdiction under Article 136 of the Constitution. ..... We are not prepared to accept the above contentions, for, the High Court took great pains to consider the contour plan in its proper perspective. This apart, the High Court's findings as noticed above are not solely based on the contour plan but other factors also. In our considered opinion the most eloquent and patent fact that must tilt the scale in this dispute in favour of the Council is that the Hotel has admittedly made a residential construction of seven floors even though their sanctioned plan was only for two floors. That necessarily means that five floors of the building have been constructed illegally and unauthorisedly. ....."

However, having noticed the argument that the demolition has to be of the five floors below the road level, the plan was sanctioned showing the road level as ground level, the Supreme Court observed that the order of the High Court is not clear as to whether the High Court intended that the construction of the two floors above the road level is to be kept intact and the rest demolished or the stepped structure of two floors raising from the natural ground level has to be kept intact and the rest demolished, which High Court should clarify.

The case was again taken up by the Division Bench of this Court on 28th Oct., 1995, reported in 1995 (2) WLR 778, wherein the Court clarified that the sanction was for constructing two floors above the "natural ground level", the top five floors have to be demolished and the two floors above the natural ground level alone to be retained without demolition.

https://hcservices.ecourts.gov.in/hcservices/

6. Learned counsel appearing on behalf of the petitioner informed that inspite of such direction of this Court, as affirmed by the Supreme Court,

the 3rd respondent has not demolished the building and structure, may be because of Section 3 of the Amendment and Validation Act, 1994.

7. The scope of regularisation of unauthorised construction de hors the town planning fell for consideration before the Supreme Court in Friends Colony Development Committee – Vs – State of Orissa reported in 2004 (8) SCC 733. In the said case, the Supreme Court opined as follows :-

> "25. Though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of discretionary power conferred by such exception has become the rule. Only such deviations deserve to be condoned as are bona fide or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilised for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions."

In the case of Consumer Action Group – Vs – State of Tamil Nadu reported in 2000 (7) SCC 425, the Supreme Court held :-

> "While exercising such power the authority has to keep in mind the purpose and the policy of the Act and while granting relief has to equate the resultant effect of such a grant on both viz., the public and the individual. So long as it does not materially affect the public cause, the grant would be to eliminate individual hardship which would be within the permissible limit of the exercise of power. But where it erodes the public safety, public convenience, public health, etc., the exercise of power could not be fore the furtherance of the purpose of the Act. Minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this before exercising such a power. Even otherwise, every individual right including fundamental right is within reasonable limit but if it makes inroads into public rights leading to public inconveniences it has to be curtailed to that extent. So no exemption should be granted affecting the

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

public at large. Various development rules and restrictions under it are made to ward off possible public inconvenience and safety. Thus, whenever any power is to be exercised, the Government must keep in mind, whether such a grant would recoil on the public or not and to what extent. If it does then exemption is to be refused. If the effect is marginal compared to the hardship of an individual that may be considered for granting."

The aforesaid case also fell for consideration before the Supreme Court in the case of Mahendra Baburao Mahadik - Vs - Subhash Krishna Kanitkar reported in 2005 (4) SCC 99, wherein the Supreme Court, following the decisions referred to above, held that the discretionary power must be exercised having regard to the larger public interest.

8. The provision of Section 113-A of Tamil Nadu Town and Country Planning Act, 1971, fell for consideration before a Division Bench of this Court in Consumer Action Group - Vs - State of Tamil Nadu reported in 2006 (4) CTC 483. The Constitutional validity of regularisation scheme for regularisation of unauthorised construction u/s 113-A having noticed, this Court held that offering priced amnesty to violators at the cost of public interest and scientific town planning reduces Statutes of such regulation to purchasable privilege from that of mandatory safeguards designed to ensure orderly growth of the city. The amended Section 113-A and scheme made thereunder were held to be in gross violation of Article 21 and 14 of the Constitution of India.

9. In the present case, the petitioner has alleged that Section 3 of the Amendment and Validation Act, 1994, could be called as single person enactment, as it was enacted just to regularise the unauthorised construction of the 3rd respondent, Pleasant Stay Hotels. On instructions, learned counsel for the State also accepted that except the 3rd respondent, in Kodaikanal no other person could derive advantage of amended Section 3 i.e., construction, which were made in contravention of the rules between 9th Dec., 1992 and 28th Nov., 1994.

In the present case, we are concerned with validity of the Amendment and Validation Act, 1994, particularly, amended Section 217-Q and Section 3 as inserted therein.

Similar provision like Section 217-Q, viz., Section 113 of the Tamil Nadu Town and Country Planning Act, 1971, fell for consideration before the Supreme Court in Consumer Action Group - Vs - State of Tamil Nadu, reported in 2000 (4) CTC 181. Under Section 113, provision of exemption was made to exempt any land or building or class of land or building from all or any of the provisions of the Act or the rules or regulations made thereunder. In the said case, though Supreme Court noticed that in the garb of its wide power, the State Government had exercised such power in favour of others illegally and arbitrarily beyond its power vested in the said provision without application of mind, held the order impugned therein as illegal and quashed them. However, Section 113 was upheld, with caution, as quoted hereunder :-

"30. When such a wide power is vested in the Government it has to be exercised with greater circumspection. Greater is the power, greater should be the caution. No power is absolute, it is hedged by the checks in the statute itself. Existence of power does not mean to give

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

one on his mere asking. The entrustment of such power is neither to act in benevolence nor in the extra statutory field. Entrustment of such a power is only for the public good and for the public cause. While exercising such a power the authority has to keep in mind the purpose and the policy of the Act and while granting relief has to equate the resultant effect of such a grant on both viz., the public and the individual. So long as it does not materially affect the public cause, the grant would be to eliminate individual hardship which would be within the permissible limit of the exercise of power. But where it erodes the public safety, public convenience, public health, etc., the exercise of power could not be fore the furtherance of the purpose of the Act. Minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this before exercising such a power. Even otherwise, every individual right including fundamental right is within reasonable limit but if it makes inroads into public rights leading to public inconveniences it has to be curtailed to that extent. So no exemption should be granted affecting the public at large. Various development rules and restrictions under it are made to ward off possible public inconvenience and safety. Thus, whenever any power is to be exercised, the Government must keep in mind, whether such a grant would recoil on the public or not and to what extent. If it does then exemption is to be refused. If the effect is marginal compared to the hardship of an individual that may be considered for granting. Such an application of mind has not been made in any of these impugned orders. Another significant fact which makes these impugned orders illegal is that Section 113 empowers it to exempt but it obligates it to grant subject to such condition as it deems fit. In other words, if any power is exercised then Government must put such condition so as to keep in check such person. We find in none of these sixty-two orders any condition is put by the Government. If not this then what else would be the exercise of arbitrary power."

In the aforesaid case of Consumer Action Group (supra), Section 113-A of the Tamil Nadu Town and Country Planning (Amendment) Act, 1998, also fell for consideration. Having noticed that the Legislature had laid down everything and did not leave it to the absolute direction of the delegatee, upheld Section 113-A as a valid one time piece of legislation.

10. The amended Section 217-Q deals with power to exempt or relax only when the State Government is satisfied that it will not result in the deterioration of the 'scenic beauty' or 'destruction of the environment' and 'eco system of the hill station'. Thus it will be evident that the State Government has not delegated unbridled or uncannalised discretionary power to any of its officer, but the same is subject to the restriction prescribed therein.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

11. One may also look into the statement of objects and reasons for the Amendment and Validation Act, 1994, which reads as follows :-

> "According to the proviso to Section 192 of the Tamil Nadu District Municipalities Act, 1920, the State Government may in respect of all municipalities or with the consent of the municipal council, in respect of any particular municipality or portion thereof, exempt all buildings or any class of buildings from all or any of provisions of Chapter X of the said Act or the rules made thereunder. In the new Chapter X-A incorporated by Tamil Nadu Act 58 of 1992, which is applicable to hill stations, there are no provisions enabling the Government to exempt any building or class of buildings from the provisions of the said Chapter X-A. The Government have therefore decided that provisions should be made in Chapter X-A of the Tamil Nadu District Municipalities Act, 1920 enabling the State Government if they are satisfied that it will not result in the deterioration of senic beauty or destruction of the environment and eco-system of the hill stations to exempt from the provisions of Chapter X or Chapter X-A of the said Act or relax the rules made under Chapter X or Chapter X-A of the said Act in respect of any building or class of buildings apart from the Central or State Government."

From the aforesaid discussions and the objects and reasons it will be evident that only when the State Government is satisfied that in a particular case, grant of exemption or relaxation will not result in the deterioration of scenic beauty or destruction of the environment or eco system of the hill stations, it may exempt or relax the provisions of Chapter X and Chapter X-A of the Act.

12. So far as amended Section 3 is concerned, there is nothing on the record to suggest that any enquiry was made in respect of constructions made between 9th Dec., 1992 and 28th Nov., 1994, has affected scenic beauty or destruction of environment and/or eco-system of the hill station. That is the pre-requirement for grant of exemption or relaxation u/s 217-Q.

In the case of Consumer Action Group reported in 2000 (4) CTC 181, the Supreme Court, while cautioned the Government to exercise such discretionary wider power, has made it clear that no power is absolute and such power cannot be exercised where it erodes public safety, public convenience, public health, etc. No exemption could be granted affecting the public at large.

It has not been disputed by the State Government that Section 3 was enacted to give benefit only to a single individual in the District of Kodaikanal, i.e., 3rd respondent of the present case.

13. Having regard to the facts and circumstances and the discussion as made above, while we hold that amended Section 217-Q of the Tamil Nadu District Municipalities Act, 1920, is valid and intra vires and do not suffer from vice of excessive delegation, we further hold that amended Section 3 of the Amendment and Validation Act, 1994, is ultra vires Article 14 of the Constitution of India.

Further, irrespective of Section 3 of the Amendment and Validation Act, 1994, judgment having been passed by this Court in petitioner's case reported in 1995 (2) WLR 737, directing the 3rd respondent to demolish the

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

rest floors of the building except the ground and first floor, as affirmed by Supreme Court in the case of the 3rd respondent, Pleasant Stay Hotels, reported in 1995 (2) WLR 769, those judgments having been passed after amendment and insertion of Section 3, the respondents are bound to comply with the Court's order, including the direction given by the Supreme Court and noticed above.

Counsel for the State informed that the building has not been demolished as the 3rd respondent was expected to undertake demolition. On instructions, learned counsel for the State informed that the respondents will demolish the structure of 3rd respondent in accordance with the directions of this Court and the Supreme Court within six months and will recover the cost from the 3rd respondent. We, accordingly, direct the respondents to remove the structure of the 3rd respondent by complying with the directions given by this Court in the petitioner's case – Palani Hills Conservation Council, reported in 1995 (2) WLR 737, as affirmed by Supreme Court, within a period of six months with liberty to recover the cost of demolition and removal of garbage from the 3rd respondent, if it is not removed by the 3rd respondent.

14. The writ petition is allowed in part with the aforesaid observations and directions. But there shall be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

GLN

To
1. The Secretary to Government
Ministry of Environment and Forest
Government of India
Paryavaran Bhavan, CGO Complex
Phase II, Lodhi Road
New Delhi – 3.

2. The Secretary to Government
Municipal Administration and
Water Supply
Government of Tamil Nadu
Fort St. George
Madras 600 009.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

3. Kodaikanal Township Committee
C/o Collector, Dindigul
Anna District.

+ 1 CC To Mr. K.Gunasekaran, Advocate SR NO.46644

+ 1 CC To Mr. T.Mohan Advocate SR NO.46533

+ 1 CC to the Government Pleader SR NO 46434

+ 1 CC To Mr. P.Srnivas, Advocate SR NO.46091

W.P. NO. 2504 OF 1995

vc[co]
gp/2.8.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/